NEW EVER KOREA TRAVEL CO LTD v. EVER KOREA SERVICE (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[CIVIL SUIT NO: WA-22NCvC-206-04-2022]
5 JANUARY 2023

Abstract – *While the evidence led by the plaintiff must be assumed to be true, the burden of proof, at all times, is borne by the plaintiff, where the defendant elected to submit no case to answer. The fact that the defendant led no evidence or called no witnesses did not absolve the plaintiff from discharging its burden of proof.*

CIVIL PROCEDURE: *Trial – Submission of no case to answer – Burden of proof – Whether on plaintiff to discharge on balance of probabilities – Whether defendant's election not to lead evidence and no witnesses called absolved plaintiff from burden of proof – Whether proof of damages without proof of amount claimed insufficient – Whether account books must be produced to prove amount of claim – Whether failure to call makers of documents rendered claim failed*

The defendant was an affiliated company and the middleman for the plaintiff, a travel agency company incorporated in Seoul, South Korea. The defendant's main functions were to arrange Malaysian group tours to Korea, collect fees from these clients on behalf of the plaintiff and forward the fees to the plaintiff after converting it to USD and to send relevant documentation of the Malaysian clients to the plaintiff. The plaintiff alleged that from 2017 to 2020, the defendant had collected fees from the Malaysian clients but failed to forward all the fees to the plaintiff. According to the records of the plaintiff, the defendant owed the plaintiff an amount of RM8,580,455.495. The plaintiff alleged that despite giving plenty of opportunities to the defendant and sending a letter of demand dated 22 February 2022, the defendant failed to pay the debt. In the suit commenced by the plaintiff, after the plaintiff closed its case, the defendant submitted a 'no case to answer' and elected not to call any witnesses. The agreed issues for the court's determination were: (i) whether there was a business relationship between the plaintiff and the defendant; and (ii) whether the defendant owed the plaintiff the amount of RM8,580,455.495.

Held (awarding nominal damages to plaintiff):

(1) In a submission of 'no case to answer', even if the plaintiff's evidence was presumed to be true and adverse inference was drawn, the burden of proof at all times was borne by the plaintiff on the balance of probabilities to establish his case against the defendant. The fact that the defendant had led no evidence or called no witnesses did not absolve the plaintiff from discharging his burden in law. (para 59)

(2) The plaintiff had proven that there was a business relationship between the plaintiff and the defendant. The defendant had not led any evidence to rebut the plaintiff's evidence. The plaintiff had pleaded the terms of the contract between the parties and the breach of the terms. The plaintiff's witness, PW2, had testified on the terms of the contract between the parties, that he dealt with the defendant's director, Wang Li Ya. The defendant's failure to call Wang Li Ya or any witness to rebut PW2's testimony led to an adverse inference against the defendant. The plaintiff thereby had proven the terms of the contract between the parties on a balance of probability. (paras 27, 38 & 39)

(3) Although the plaintiff contended that it had sent a letter of demand in 2022, the defendant denied receiving the alleged letter of demand. The burden to prove the service of the letter of demand was on the plaintiff. However, the plaintiff had failed to discharge this burden. It was strange that for such a huge, alleged debt of RM8,580,455.495, owing from 2016 to 2020, the plaintiff chose to send only one letter of demand in 2022 and even then, to send by registered post and not by hand. (paras 48-50)

(4) A plaintiff seeking damages has the burden of proving the amount of damages before he could recover the damages. Where damages is shown but its amount is not proved sufficiently or at all, the court will award only nominal damages. It is not sufficient to call an accountant to testify based on his report prepared from an examination of the account books of the plaintiff for the relevant period. The account books must be produced. As the underlying documents used for the 2016 annual reconciliation statement were not produced in the court and the persons who were the makers of those documents were also not called to testify, the plaintiff had failed to prove that the defendant owed the plaintiff a sum of RM12,281,934.250 as at 1 January 2017. Since the starting debt of RM12,281,934.250 as at 1 January 2017 for the debits and credits from January 2017 to November 2020 was not proven, the sum of RM8,580,455.495 as at 30 November 2020 was therefore not proven. (paras 47, 53, 55 & 56)

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel Ltd (1948) 64 TLR 177 ***(refd)***

Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***
Yui Chin Song & Ors v. Lee Ming Chai & Ors [2019] 7 CLJ 740 FC ***(refd)***

For the plaintiff - Alex Gan Yi Yang & Ng Shawn; M/s Vilasiny Gan & Co
For the defendant - P Taneswaran; M/s Tanes, Khoo & Paulraj

Reported by S Barathi

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] This is a trial of a suit for an alleged unpaid debt of RM8,580,455.495. It should be a typical run-of-the-mill trial. It is not simply because the defendant had chosen to submit that there is 'no case to answer' and elected not to call any witnesses. Such a course is perilous "to take simply because all the evidence adduced by the plaintiff must be presumed to be correct". (See *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 CA, per Abdul Malik Ishak JCA at para. 41). I shall elaborate more on the law on this in my grounds of judgment below.

[2] The plaintiff is a company incorporated in Seoul, South Korea with a business address at RM302, 2, 1-gil, Jinheung-ro, Eunpyeong-gu, Seoul, Korea. The plaintiff is a travel agency.

[3] The defendant is a company incorporated in Malaysia with a registered address at No. 5 (1st Floor), Jalan Kijang, Taman Suntex, Batu 9, 43200 Cheras, Selangor and a business address at D-3-7, Seri Gembira Avenue, No. 6, Jalan Senang Ria, Taman Gembira, 58200 Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur. The defendant is also a travel agency.

The Trial Process

[4] The trial took two days on 20 September 2022 and 26 September 2022.

[5] The plaintiff called two witnesses. They are:

(i) Ms Han Yok Cheng (PW1) who is the General Manager of the plaintiff. Her witness statement is marked as WS PW1;

(ii) Mr Sung Chang-Yih (PW2) who is a director of the plaintiff and also a shareholder of the defendant. His witness statement is marked as WS PW2.

[6] After the plaintiff closed its case on 26 September 2022, the defendant's counsel informed this court that he had instructions to submit 'no case to answer' and that the defendant wouldn't be calling any witnesses.

[7] Parties concurrently filed their written closing submissions followed by their written submissions in reply. In the defendant's written closing submissions at para. 3, the defendant again confirmed that the defendant has elected not to call any witnesses as it elected to invoke a submission of 'no case to answer'. In the defendant's reply written submissions at paras. 1 and 2 the defendant reiterated this election. This election is also stated in the plaintiff's written closing submissions at para. 1.

[8] Oral submissions by counsel were held before me on 6 December 2022. At the outset of the submissions, for the avoidance of doubt, I asked the counsel for the defendant to again confirm his earlier election that the defence would not be calling any witness and he would stand or fall on his submissions. He so confirmed.

Background Facts

[9] The plaintiff's pleaded case in its writ and statement of claim dated 12 April 2022 is that the defendant is an affiliated company of the plaintiff. The defendant is a middleman for the plaintiff and its main functions are to arrange Malaysian group tours to Korea, collect the fees from these Malaysian clients on behalf of the plaintiff, forward these fees to the plaintiff after converting to USD and to send relevant documentation on these Malaysian clients to the plaintiff. The defendant's director Ms Wang Li Ya (also known as Jojo Wang) was the person in charge who would liaise with Ms Kang So Yeon a staff of the plaintiff.

[10] The plaintiff further alleged that from 2017 to 2020 the defendant had collected fees from Malaysian clients but failed to forward all the fees to the plaintiff. According to the records of the plaintiff the defendant owed the plaintiff RM8,580,455.495.

[11] The plaintiff also alleged that despite giving plenty of opportunities to the defendant and sending a letter of demand dated 23 February 2022 through its solicitors to the defendant, the defendant failed to pay the debt.

[12] In the defence, the defendant denies owing the alleged claimed sum and the defendant prays that the plaintiff's suit be dismissed with cost. The defendant also denies receiving the alleged letter of demand dated 23 February 2022.

The Issues

[13] The agreed issues by the parties to be determined by this court are-

(i) whether there is a business relationship between the plaintiff and the defendant; and

(ii) whether the defendant owes the plaintiff an amount of RM8,580,455.495.

[14] The defendant in its written submissions asserted the following three grounds:

(i) There was no contractual relationship between the plaintiff and the defendant and if there is any (which is denied), there are no clear terms of contract between the parties.

(ii) The alleged claim sum of RM8,580,455.495 are fabricated figures created by the plaintiff.

(iii) The defendant has not been paid by third parties.

[15] I shall deal with the two agreed issues one by one. However, before I do that, since the defendant has submitted 'no case to answer', it is appropriate for me at this juncture to review the law on 'no case to answer' as I understand it.

A Review Of The Law On 'No Case To Answer'

[16] There are three leading Federal Court cases on the principles applicable to a submission by a defendant on 'no case to answer' after a plaintiff had closed its case.

[17] The cases in chronological order are *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 SC, *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609 FC and *Yui Chin Song & Ors v. Lee Ming Chai & Ors* [2019] 7 CLJ 740; [2019] 6 MLJ 417 FC.

[18] In *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 SC ("*Jaafar Shaari*") Gopal Sri Ram JCA said at p. 528 d:

> … counsel would have been entitled to inform the court that he was not calling any evidence. Once he had done this, *it was incumbent for the learned Sessions judge to have put counsel to his election, namely, that if he did not call evidence, he would stand or fall on his submissions.* The rule of procedure, which requires these steps to be followed, is not a mere formality but one of essential justice. For, *once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.*
>
> In this context it is sufficient to refer to the following passage in the judgment of Elphinstone CJ *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125, 128:
>
> > If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. *At this stage the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.* (emphasis added)

[19] In *Jaafar Shaari*, Peh Swee Chin FCJ also said at p. 519 e: A

> The defendants had however chosen to close the case at the end of the plaintiff's case, they were entitled to do so though they would be in peril of not having the evidence of their most important witness and of *having any adverse inference drawn against them for failing to call any such evidence should the circumstances appropriately call for such an adverse inference* or for the presumption of avoiding unfavourable evidence by the defence to be invoked against the defendants. (emphasis added) B

[20] In *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609 FC ("*Syarikat Kemajuan Timbermine*") Ramly Ali FCJ held: C

> Whether The Plaintiff Has Met The Burden Of Proof Where The Defendant Elected Not To Call Any Witnesses
>
> [56] Learned counsel for the plaintiff argued that the Court of Appeal ought not to disturb findings of fact by the High Court. … *It was further submitted that the evidence led by the plaintiff must be assumed to be true when the defendant elected not to call any witnesses. On these submissions we have two observations to make.* The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (See *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 and *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785). And the second is *that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement* (See *Ranbaxy (Malaysia) Sdn Bhd v. EI Du Pont De Nemours And Co* [2011] MLJU 1135; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim (See *The Fordeco Nos 12 And 17; The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v. Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 MLJ 449, *Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd And Other Appeals* [2004] 4 MLJ 105 and *Teh Swee Lip v. Jademall Holdings Sdn Bhd* [2013] 6 MLJ 32). *It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law.* In this regard, in adopting the approach of the case of *Storey v. Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment: D E F G H I

A *There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.*

B [57] We therefore agree with the submission of learned counsel for the defendant to the effect that *despite the fact the defendant did not call any witness and that even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that* C *the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement.* This crucial point was overlooked by the learned High Court judge. On the factual matrix of the case, it is patently clear that the plaintiff has not discharged the burden. On this basis, the Court of Appeal was in every respect justified in holding D that the learned High Court judge was plainly wrong in making a ruling of law that the settlement agreement had come into existence based on the conduct of both parties. Indeed, the election by the defendant to call no evidence at trial does not preclude the reversal of a plainly wrong findings of the learned High Court judge by the Court of Appeal.

(emphasis added)

E **[21]** In *Yui Chin Song & Ors v. Lee Ming Chai & Ors* [2019] 7 CLJ 740; [2019] 6 MLJ 417 FC Ramly Ali FCJ reiterated the principles set out by him in *Syarikat Kemajuan Timbermine* and summarised the law on 'no case to answer' as follows:

F Question 3

'No case to answer'

…

[46] The basic principles on the issue as adopted in those authorities cited G above may be summarised as follows:

(a) **where the defence submits no case to answer, the trial judge must put to the defence the election available as to whether he wishes to call evidence for the defence or not;** the judge should generally refuse to make such a ruling on such submission of no case to answer unless the defence makes it clear that he does not intend H to call evidence;

(b) if the judge does not put the defendant to election whether to call evidence or not, then in such a situation the defence retains his right to call evidence if his submission fails; and

I (c) **if the defendant or his counsel has so elected, he is bound by it and loses his right to call evidence in the defence case and accordingly must stand or fall on their submission.**

[47] The following statement by Lord Greene MR, sitting at the Court of Appeal, in the case of *Yuill v. Yuill* provides a clear picture on the issue:

> It does not mean that counsel by submitting no case *ipso facto* loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in *Laurie v. Raglan Building Co Ltd*) impliedly. The practice which has been laid down amount to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission.

[48] This court in *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609 has laid down the principle on this issue in the following words:

> The respondent's election to call no evidence at the trial did not preclude the reversal of plainly wrong findings of the High Court by the Court of Appeal. Though no witnesses were called by the respondent and even if the appellant's evidence was unopposed and therefore presumed to be true, that did not automatically mean the evidence had satisfied the burden of proving the existence of the settlement agreement borne by the appellant, or mean the burden of proving on balance of probabilities no longer applied or that a case to answer was automatically made out. The evidence adduced by the appellant had to be sufficient to prove the existence of the settlement agreement. The appellant failed to discharge that burden.

[49] The above ruling was consistent with the well-established principle that **the burden of proof at all times is borne by the plaintiff on the balance of probabilities to establish his case against the defendant** or the existence of a legally enforceable claim against the defendant. It is upon the plaintiff, and certainly not the defendant, to discharge that burden. It is for the plaintiff to prove his case and satisfy the court that his claim is well-founded before the court can grant judgment on his claim. **The fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his burden in law.**

[50] In this regard, Suriyadi, JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81, recognised the above ruling in the following passage:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged. (emphasis added)

[22] Another relevant case is the court of appeal decision in *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 where Abdul Malik Ishak JCA said:

> [41] … I am of the opinion that the following guidelines may be taken as well settled. *At the close of the plaintiff's case, the first defendant chose to submit that there was no case to answer and preferred not to call witnesses. It was a perilous course to take simply because all the evidence adduced by the plaintiff must be presumed to be correct.* It is a sound general rule that a judge should not consider a submission of no case to answer unless the defendant (here the first defendant) agrees not to call any evidence, whatever the outcome of the submission. Thus, where a defendant is put to his election and elects not to call evidence, just like the present appeal, the result is this. That the trial is in effect truncated and *the question for the judge to consider is whether the plaintiff has established his case by the evidence called on the balance of probabilities. If the plaintiff has done so, then the judgment should be given to the plaintiff.* If the plaintiff has not done so, then the judgment should be given to the defendant. If the judge chooses the latter course of action and give judgment to the defendant, the judge may indeed be of the view that there is no case for the defendant to answer. But such a judgment should not be given unless the judge finds that the plaintiff has not established his case by the evidence adduced on the balance of probabilities. (emphasis added)

[23] From the above cases, the principles applicable when a defendant submits 'no case to answer' can be distilled as follows:

(i) At the close of the plaintiffs' case a defendant can opt not to call any witness for the defence but instead make a submission of 'no case to answer'.

(ii) Where the defence submits 'no case to answer', the trial judge must put the defence counsel to his election, namely, that if he elects not call evidence, he will stand or fall on his submissions.

(iii) The judge should refuse to make a ruling on a submission of 'no case to answer' unless the defence makes it clear that he does not intend to call any witness for the defence.

(iv) For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true. (See *Jaafar Shaari*, Gopal Sri Ram JCA at p. 528 (d)).

(v) Adverse inference can be drawn against the defendant for failing to call any witnesses should the circumstances appropriately call for such an adverse inference. (See *Jaafar Shaari*, Peh Swee Chin FCJ at p. 519 (e)).

(vi) However, even if the plaintiff's evidence is presumed to be true and adverse inference is drawn, the burden of proof at all times is borne by the plaintiff on the balance of probabilities to establish his case against the defendant. It is for the plaintiff to prove his case and satisfy the court that his claim is well-founded before the court can grant judgment on his claim. The fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his burden in law. (See *Jaafar Shaari*, Peh Swee Chin FCJ at p. 519, *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609 FC Ramly Ali FCJ, *Yui Chin Song & Ors v. Lee Ming Chai & Ors* [2019] 7 CLJ 740; [2019] 6 MLJ 417 FC Ramly Ali FCJ and *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 Abdul Malik Ishak JCA).

[24] Now that I have analysed the law on 'no case to answer', I will now consider the two agreed issues to be tried.

Agreed Issue (a)

Whether There Is A Business Relationship Between The Plaintiff And The Defendant

The Plaintiff's Contentions

[25] The plaintiff asserts there is a business relationship between the plaintiff and the defendant. As evidence, the plaintiff refers to the testimonies of PW1 and PW2 and the documents in common bundle of documents vol. 1 at pp. 58 to 450.

The Defendant's Contentions

[26] The defendant contends there is no business relationship between the plaintiff and the defendant.

Findings Of The Court

[27] It is my view the plaintiff has proven there is a business relationship between the plaintiff and the defendant. Such business dealing can be seen from the documents and emails exchanged between the plaintiff and defendant in B1 common bundle of documents vol. 1 at pp. 58 to 450. The defendant has not led any evidence to rebut this evidence of the plaintiff's.

Agreed Issue (b)

Whether The Defendant Owes The Plaintiff An Amount Of RM8,580,455.495

The Plaintiff's Contentions

[28] The plaintiff's witness PW1 testified in her witness statement at Q & A 5 that she worked with the plaintiff's South Korean staff to prepare a running account statement that shows money transactions between the plaintiff and the defendant from January 2017 to November 2020.

[29] The plaintiff's witness PW1 testified in her witness statement at Q & A 5 to 7 that she worked with the plaintiff's South Korean staff to prepare the running account statement by accessing the plaintiff's database to obtain emails, invoices, confirmation letters, money remittances and the plaintiff's bank statements.

[30] The running account statement can be seen at B23 at pp. 8794 to 8875. This statement is marked as exh. H1. It shows a debt of RM7,347,721.250 as at 31 December 2016 (See p. 8794) and a debt of RM8,580,455.495 as at 30 November 2020 (See p. 8875).

[31] PW2 in his Q & A 9 testified that he had directed PW1 and the plaintiff's South Korean staff (Kang So Yeon) to prepare the said running account statement.

[32] The plaintiff is suing on this debt of RM8,580,455.495 as at 30 November 2020 (see statement of claim at para. 12a).

[33] The plaintiff relies on the WhatsApp messages exchanged between PW2 and Ms Wang Li Ya (also known as Jojo Wang) as an admission of the debt. See B22 at p. 8663 for the alleged admission.

The Defendant's Contentions

[34] The defendant asserts that, even if there is a contractual *ie*, business relationship between the plaintiff and the defendant, the plaintiff had failed to prove the terms of the contract between the parties. Without such terms been proven the defendant contends there is no basis to say the defendant owes the plaintiff an amount of RM8,580,455.495.

[35] The defendant also asserts that the plaintiff had failed to prove that the defendant owes the plaintiff a sum of RM12,281,934.250 as at 1 January 2017. This sum of RM12,281,934.250 as at 1 January 2017 was used by the plaintiff in its running account as the starting debt for the debits and credits from January 2017 to November 2020. (See B23 pp. 8794 to 8875 marked as exh. H1). Since the starting debt of RM12,281,934.250 as at 1 January 2017 for the debits and credits from January 2017 to November 2020 is not proven, the sum of RM8,580,455.495 as at 30 November 2020 (See statement of claim at para. 12a) is therefore not proven.

[36] The defendant denies that the WhatsApp messages exchanged between PW2 and Ms Wang Li Ya (also known as Jojo Wang) (See B22 at p. 8663) is an admission of the debt.

Analysis Of The Court

Has The Plaintiff Proven The Terms Of The Contract Between The Parties?

[37] I agree with the defendant's submission that the plaintiff must prove the terms of the contract between the parties. Without such terms been proven there is no basis to say the defendant owes the plaintiff an amount of RM8,580,455.495.

[38] In my view, the plaintiff had pleaded the terms of the contract between the parties in its statement of claim at para. 5 and the breach of the said terms at paras. 6 to 9. The plaintiff's witness PW2 had testified on the terms of the contract between the parties in his witness statement WSPW2 at Q & A 5. PW2 said he dealt with the defendant's director by the name of Ms Wang Li Ya (also known as Jojo Wang).

[39] Since the defendant had not called Ms Wang Li Ya (also known as Jojo Wang) or any witness to rebut PW2's testimony, thereby leading to an adverse inference to be invoked against the defendant, in my view the plaintiff had proven the terms of the contract between the parties on a balance of probability. (See *Jaafar Shaari* Peh Swee Chin FCJ at p. 519, *Syarikat Kemajuan Timbermine* Ramly Ali FCJ, *Yui Chin Song & Ors v. Lee Ming Chai & Ors* [2019] 7 CLJ 740; [2019] 6 MLJ 417 FC Ramly Ali FCJ and *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 Abdul Malik Ishak JCA).

Has The Plaintiff Proven The Defendant Owes The Plaintiff An Amount Of RM8,580,455.495?

[40] I propose to review the law on whether a plaintiff must prove his damage on a claim for breach of contract before I apply the law to the facts of this case.

The Law On The Burden Resting On A Plaintiff To Prove His Damage On A Claim For Breach Of Contract

[41] A starting point in Malaysia on the burden resting on a plaintiff to prove his damage on a claim for breach of contract is the 1989 High Court case of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 HC by Edgar Joseph Jr. ("*Popular Industries*").

[42] Edgar Joseph Jr. in *Popular Industries* approved the famous *dictum* of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* 64 TLR 177 at p. 178, namely, that:

A Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

B **[43]** In *Popular Industries,* the plaintiffs had commenced an action against the defendants' claiming damages for non-delivery of goods alleging loss of profits on resale. To prove their claim for damages, the plaintiffs called as their witness an accountant. The accountant produced a sheet of calculations (marked as exh. P76) which was meant to show the estimated losses suffered by the plaintiffs as a consequence of the defendants' non-delivery of the goods. It was contended by the plaintiffs that the oral testimony of the accountant and exh. P76 were based on the results of his examination of the account books of the plaintiffs for the relevant period. The account books themselves were never produced.

D **[44]** Edgar Joseph Jr. said at Held 6, 8, 9, 11 and 12 of the MLJ report that:

[6] It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover the damages. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus, nominal damages may be awarded in all cases of breach of contract. And, **where damage is shown but its amount is not proved sufficiently or at all, the court usually decrees nominal damages.**

F …

[8] As the relevant accounts books of the plaintiffs were never produced, the oral evidence of the accountant and exh. P76 were rendered inadmissible.

[9] It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say the production of the documents itself, is essential. The burden of proving the existence of any circumstances bringing the case within any of the exceptions lies upon the party seeking to adduce secondary evidence of the contents of the document. In the present case, the plaintiffs made not the slightest attempt to discharge that burden, with the result that exh. P76, which was alleged to be extracted from the books of accounts of the plaintiffs which were never produced, was inadmissible in evidence. Similarly, the oral evidence of the accountant which was based on exh. P76 was also inadmissible for the same reason.

I …

[11] Even had the accounts books been in evidence, they could not by themselves have been sufficient to charge the defendants with liability, having regard to the provisions of s. 34 of the Evidence Act, so that **the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries.** The accountant was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts.

[12] In all the circumstances, reason and justice pointed to the inevitable conclusion that **although the plaintiffs had shown the fact of damage, no evidence or no sufficient evidence had been adduced as to its amount** with the result that it was virtually impossible to assess damages. Accordingly, **all that the court could do was to make an award of nominal damages** of US$500, that being the currency of the contract. (emphasis added)

[45] *Popular Industries* was approved by the Supreme Court in *Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569 SC at p. 796 (CLJ); p. 582E-F (MLJ). ("*Malaysian Rubber Development*"). Mohamed Dzaiddin SCJ said:

> For this head of damages, the plaintiff was entitled to claim for such amount as it could prove to be clearly attributable to the first defendant's breach of the said agreement. In this regard, **we would approve what was stated in** *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p. 367:
>
> > It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (See *Marzetti v. Williams* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v. Deveridge* (1825) 2 C & P 109; 172 ER 50 and *Twyman v. Knowles* 138 ER 1183. (emphasis added)

[46] Later, when elevated to the Supreme court, Edgar Joseph Jr FCJ in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777 FC had the opportunity to refer to his High Court decision in *Popular Industries* and its approval by the Supreme Court in *Malaysian Rubber Development*. Delivering the judgment of the court Edgar Joseph Jr FCJ said at p. 20 (CLJ); p. 785 (MLJ):

> ... there are three preliminary matters which, at the outset, require emphasis. Firstly, that part of the judgment which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the

vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* 64 TLR 177 at p. 178:

> … plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

This *dictum* was referred to and applied by our Court of Appeal in *John v. Dharmaratnam* [1962] MLJ 187. And, in *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, the court had occasion to say this (at p. 367):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (See *Marzetti v. Williams* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v. Deveridge* (1825) 2 C & P 109; 172 ER 50 and *Twyman v. Knowles* 138 ER 1183.

In *Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd* [1994] 3 MLJ 569 at p 582E-F, Mohamed Dzaiddin SCJ, speaking for the Supreme Court, quoted, with approval, the above passage in the *Popular Industries* case.

[47] From the above cases, the principles applicable to a claim for breach of contract based on unpaid invoices can be distilled as follows:

(i) A plaintiff seeking damages has the burden of proving the amount of damages before he can recover the damages.

(ii) Where damage is shown but its amount is not proved sufficiently or at all, the court will award only nominal damages.

(iii) It is not sufficient to call an accountant to testify based on his report prepared from an examination of the account books of the plaintiff for the relevant period. The account books themselves must be produced. This is because when documentary evidence is tendered, primary evidence of the document, that is to say the production of the documents itself, is essential. If not produced, the oral evidence of the accountant as well as his report are inadmissible.

(iv) Even if the account books are produced the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant is not such a person.

Application Of Law To The Facts

[48] Firstly, I will deal with the fact that not a single letter of demand was ever sent to the defendant by the plaintiff for such an alleged huge debt owing from 2016 to 2021.

[49] The plaintiff contends it has in the year 2022 sent a letter of demand dated 23 February 2022 through its solicitors to the defendant. The defendant denies receiving the alleged letter of demand dated 23 February 2022. I note that the alleged letter of demand was sent by registered post. (See B1 pp. 54 to 57). However, there is no proof it was ever received by the defendant.

[50] The defendant's address is No. 5 (1st Floor), Jalan Kijang, Taman Suntex but the letter of demand was addressed to No. 5, Jalan Kijang, Taman Suntex. The word '(first floor)' is missing. In my view, the burden lies on the plaintiff to prove service if it intends to run the argument the defendant had received the demand and failed to deny liability. The plaintiff has failed to discharge this burden. To my mind, it is strange that for such a huge, alleged debt of RM8,580,455.495 (owing from 2016 to 2020) the plaintiff chose to send only one letter of demand in 2022, and even then, to send by registered post and not by hand.

[51] Secondly, I will deal the defendant's submission that the plaintiff had failed to prove that the defendant owed the plaintiff a sum of RM12,281,934.250 as at 1 January 2017.

[52] I accept the submissions of the defendant that the plaintiff had failed to prove that the defendant owed the plaintiff a sum of RM12,281,934.250 as at 1 January 2017. This sum of RM12,281,934.250 as at 1 January 2017 was used by the plaintiff in its running account as the starting debt for the debits and credits from January 2017 to November 2020. (See B23 pp. 8794 to 8875 marked as exh. H1).

[53] To support the plaintiff's assertion that the defendant owes the plaintiff a sum of RM12,281,934.250 as at 1 January 2017, the plaintiff relies on the documents at B23 pp. 8888 to 8943 and its English translations in B24 pp. 13 to 68. However, these documents are marked as Part C. The makers were not called as witness. PW1 cannot testify as she is not the maker. PW1 only joined the plaintiff in Dec 2021. (See notes of proceeding p. 14 line 10). PW2 is also not the maker of these documents.

[54] A perusal of these documents in B24 pp. 13 to 68 also show that they are Reconciliation Statements for 2016, Statements of Money Transfers and statement of accounts of the defendant. The underlying documents used for the 2016 Annual Reconciliation Statement (B24 p. 13) were not produced in court. This is admitted by PW1. (See notes of proceeding p. 23 line 25 to p. 24 line 2) who said under cross-examination (PT is the defence counsel and Han is PW1):

PT Oh yeah, yeah, that's what I'm asking. Is there proof that you have here 26 any invoices for the year 2016?

HAN Here in courtlah?

PT Yeah.

HAN In courtlah?

PT Yeah that she has seen.

HAN Correct there is none in court here.

[55] The law is clear that as the underlying documents used for the 2016 Annual Reconciliation Statement (B24 p. 13) were not produced in court and the persons who were the makers of those documents were also not called to testify, the plaintiff had failed to prove the defendant owed the plaintiff a sum of RM12,281,934.250 as at 1 January 2017. (See *Popular Industries* Edgar Joseph Jr. J at Held 6, 8, 9, 11 and 12 of the MLJ report).

[56] Since the starting debt RM12,281,934.250 as at 1 January 2017 for the debits and credits from January 2017 to November 2020 is not proven, the sum of RM8,580,455.495 as at 30 November 2020 (see statement of claim at para. 12a) is therefore not proven.

WhatsApp Messages Exchanged Between PW2 And Ms Wang Li Ya (Also Known As Jojo Wang). See B22 At Page 8663

[57] Thirdly, I will deal with the reliance by the plaintiff on the WhatsApp messages exchanged between PW2 and Ms Wang Li Ya (also known as Jojo Wang) as an alleged admission of the debt (see B22 at p. 8663).

[58] I have perused B22 from pp. 8650 to 8663. In my mind, these messages relate to attendances in a court suit the details of which are unclear (p. 8650), transfers of monies from Malaysia to Vietnam and Taiwan (p. 8651) and miscellaneous discussions. They are not sufficient to prove on a balance of probability that the defendant owes the plaintiff the sum of RM8,580,455.495 as at 30 November 2020 (see statement of claim at para. 12a).

Decision

[59] To recap, in a submission of 'no case to answer' even if the plaintiff's evidence is presumed to be true and adverse inference is drawn, the burden of proof at all times is borne by the plaintiff on the balance of probabilities

to establish his case against the defendant. It is for the plaintiff to prove his case and satisfy the court that his claim is well-founded before the court can grant judgment on his claim. The fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his burden in law. (See *Jaafar Shaari* Peh Swee Chin FCJ at p. 519, *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609 FC Ramly Ali FCJ, *Yui Chin Song & Ors v. Lee Ming Chai & Ors* [2019] 7 CLJ 740; [2019] 6 MLJ 417 FC Ramly Ali FCJ and *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 Abdul Malik Ishak JCA).

[60] Since the plaintiff had failed to prove the starting debt of RM12,281,934.250 as at 1 January 2017 for the debits and credits from January 2017 to November 2020, the alleged debt of RM8,580,455.495 as at 30 November 2020 (see statement of claim at para. 12a) is therefore not proven.

[61] Where the amount is not proved sufficiently or at all, the court will award only nominal damages. (See *Popular Industries*).

[62] Accordingly, I award nominal damages of RM5,000 to be paid by the defendant to the plaintiff. The defendant is to pay to the plaintiff interest on RM5,000 at 5% p.a. from date of judgment till full payment and costs of RM30,000 subject to allocator.